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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KELLY LEWIS BABER, Defendant and Appellant.	E040189 (Super.Ct.No. RIF 125678) OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, Judge. (Retired judge of the Riverside Superior Court, assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed with directions.

Brent Riggs, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General,

Lynne G. McGinnis, Elizabeth A. Hartwig and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, while intoxicated, rammed his pickup truck four times into the back of a car occupied by two teenaged girls. A jury convicted defendant of one felony count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] and two misdemeanor counts of driving under the influence. (Veh. Code, § 23152.) The court sentenced defendant to a three-year term on count 1 and concurrent 180-day sentences on counts 2 and 3.

On appeal, defendant makes four contentions: 1) the court failed to excuse a juror who may have been slightly acquainted with the victim's family; 2) the court should have instructed the jury on the defense's theory of accident; 3) the prosecutor erred in her argument; and 4) section 654 required the court stay the sentence on count 3.

As to the latter issue, the People concede count 3 should have been stayed and request the abstract of judgment be corrected accordingly. With this exception, we reject defendant's contentions and affirm the judgment.

I

FACTS

Two teenagers, Chelsea and Cameron, returned one evening from a shopping trip in Chelsea's parents' Toyota Corolla. Chelsea had been licensed for only a few months. They parked outside Cameron's house to talk. Defendant's red pickup truck struck the

[1] Statutory references are to the Penal Code unless stated otherwise.

Corolla three times from the rear with increasing force. Each time Chelsea drove forward to try to avoid the truck. After the third hit, she turned left into a cul-de-sac, driving between 10 and 15 miles an hour. The pickup rammed the Corolla a fourth time, causing Chelsea to lose control of the steering wheel and shoving the Corolla up on the curb. Defendant sped away.

During the ordeal, Chelsea feared defendant meant to kill them. The Corolla was damaged and Chelsea suffered some soreness afterwards.

When the police detained defendant, he was slumped against his truck. He had urinated upon himself and was unsteady on his feet. The police officer described him as being "extremely drunk." Defendant's blood alcohol level was .22 percent, making it completely unsafe to drive. The front of the truck was damaged and radiator fluid was leaking.

II

ANALYSIS

A. Implied Bias of Juror

Before testimony began, juror No. 7 told the court he had recognized a man and a woman in the courtroom from a church-related bowling event. The two people were apparently the parents of one of the victims. After inquiry by the court, the prosecutor, and defense counsel, it was established that the juror had no personal relationship with the two people. He did not know their names. He stated he could base his decision on the facts. The court admonished the jury not to discuss juror No. 7 having recognized two people. The victims' parents did not testify.

Defendant argues the court's handling of the foregoing was an abuse of discretion and that juror No. 7 should have been examined more thoroughly for cause based on an implied bias for having an "[i]nterest . . . in the event of the action, or in the main question involved in the action, . . ." (Code Civ. Proc., § 229, subd. (d); § 1120; *People v. Holt* (1997) 15 Cal.4th 619, 655-656.) Defendant identifies the juror's church-related association with the people he recognized as an "interest . . . in the event of the action."

The cases relied upon by defendant are factually and legally distinct. In *People v. Chavez* (1991) 231 Cal.App.3d 1471, 1483, the appellate court found harmless error where the trial court did not conduct a hearing after a juror admitted talking to a police witness and defense counsel had conducted an independent inquiry. In *People v. Holt, supra,* 15 Cal.4th at pp. 654-656, the Supreme Court upheld the trial court's dismissal of a juror in a capital case where the juror had sued the district attorney in an unrelated matter.

The present case did not involve a juror recognizing a witness or a juror suing the district attorney. The juror volunteered the possible conflict himself, signaling his intention to perform his duties properly. (*People v. Ray* (1996) 13 Cal.4th 313, 344.) The trial court conducted an inquiry and both lawyers also questioned juror No. 7. The tenuous connection between juror No. 7 and the parents of one of the victims, with whom he had the slightest acquaintance and who did not testify at trial, hardly connotes implied bias. No abuse of discretion occurred. (*People v. Holt, supra,* 15 Cal.4th at pp. 655-656.)

B. Jury Instruction on Accident

Apparently the trial court agreed to give CALCRIM No. 3404[2] on the defense's theory of accident but then omitted to do so. Defendant contends the omission was prejudicial error: "[D]efendant was entitled to the instruction as to accident and misfortune in the terms or substance in which he requested it so that the jury's attention would be directed to the possible, reasonable view of the evidence urged by defendant." (*People v. Acosta* (1955) 45 Cal.2d 538, 544.) Defendant acknowledges reversal is only warranted when a more favorable outcome for defendant would have been reasonably probable had an instruction about accident been given. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 391.)

We first observe defendant mischaracterizes the nature of the defense when applied to the circumstances of the present case. In cases in which the courts have required an accident instruction, the claimed accident occurred under circumstances in which the absence of criminal intent precluded the conduct from being criminal. In *People v. Gonzales*, *supra*, 74 Cal.App.4th 382, the conduct was opening the bathroom door without the intent to harm the victim. In *People v. Acosta, supra*, 45 Cal.2d 538, the conduct was attempting to stop a taxi after the driver fell out of the vehicle and the

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[2] "[The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of _____ <*insert crime[s]*> unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.]" (CALCRIM No. 3404.)

defendant mistakenly stepped on the accelerator rather than the brake. There was no criminal intent unlawfully to take or drive the vehicle.

Applying this conclusion to the instant case, it was undisputed defendant was driving under the influence of alcohol, a violation of law. Defendant does not contend his unlawful act was the result of accident or misfortune and therefore concedes it occurred with the requisite criminal intent. Rather, he contends the injury to the victims was proximately caused, not by driving while intoxicated, but by the result of the unintended accident or misfortune of him hitting the victims' car four times, an act committed without criminal intent.

Sufficient evidence however, demonstrated that defendant intentionally, not accidentally, committed the crime of assault with a deadly weapon. He repeatedly rammed the victim's truck, going so far as to turn into a cul-de-sac to continue the assault. The injury to the victims was a proximate result of defendant's conduct with criminal intent. Therefore, the instruction of accident or misfortune was inapplicable. Even if the court mistakenly meant to do so, it was under no duty to give that instruction.

Moreover, even if giving the instruction was proper, we agree it was harmless error because a more favorable outcome for defendant was not reasonably probable. (*People v. Gonzales, supra,* 74 Cal.App.4th at p. 391.) The court instructed the jury that the crime of assault with a deadly weapon had to be proved beyond a reasonable doubt, including that defendant committed the act intentionally or purposefully. (CALCRIM Nos. 250, 370, 372, and 875.) The jury knew the prosecution had to show defendant did not hit the victims accidentally. A court does not need to give instructions on points

adequately covered by other instructions. (*People v. Silva* (2001) 25 Cal.4th 345, 371, 372.) Furthermore, in closing argument, both the prosecutor and the defense attorney argued about whether what happened was intentional or accidental. Unquestionably, this jury knew it had to find defendant acted intentionally, not accidentally, in order to convict him of assault with a deadly weapon—a verdict it reached in short order.

Therefore, we reject defendant's argument about giving a jury instruction on accident.

C. Prosecutorial Error

Defendant asserts that several instances of prosecutorial misconduct deprived him of his state and federal constitutional rights to due process of law and a fair trial. It is well-established that "[t]o constitute a violation under the federal Constitution, prosecutorial misconduct must 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.' [Citations.] 'But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' (*People v. Earp* (1999) 20 Cal.4th 826, 858.) To be cognizable on appeal, a defendant '"must make a timely objection at trial and request an admonition; otherwise, the [claim of prosecutorial misconduct] is reviewable only if an admonition would not have cured the harm caused by the misconduct."' [Citations.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 122.)

Additionally, "'[t]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom'" (*People v. Sims*

(1993) 5 Cal.4th 405, 463, and that the prosecutor 'may "vigorously argue his case" . . . , "[using] appropriate epithets warranted by the evidence."' (*People v. Fosselman* (1983) 33 Cal.3d 572, 580.) Second, if misconduct had occurred, we determine whether it is 'reasonably probable that a result more favorable to the defendant would have occurred' absent the misconduct. [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 752-753.) Defendant must show a reasonable likelihood the jury understood or applied the objectionable comments improperly or erroneously. (*People v. Frye* (1998) 18 Cal.4th 894, 970.)

Both prosecutor (and defense counsel) may argue emotionally, vividly, melodramatically, and theatrically. (*People v. Ochoa* (1998) 19 Cal.4th 353, 463.) The prosecutor's negative characterization of a defendant may be proper when based on reasonable inferences: "Argument may be vigorous and may include opprobrious epithets reasonably warranted by the evidence." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030.)

With these principles in mind, we evaluate defendant's four claims of error. First, defendant complains about the prosecutor's comments that defendant had committed a "completely random act of violence" and "[i]magine how those kids felt, thinking they were about to die" as an improper appeal to the jury's passion and prejudices. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694.) Defendant did not object, waiving any error. Even so, in view of the wide range permitted in the scope of a prosecutor's argument, these comments did not constitute misconduct, particularly since they were supported by

the uncontested evidence that the attack was entirely unprovoked and the victims feared for their lives.

The second instance of purported misconduct cited by defendant is the prosecutor's musings "maybe he wanted to do whatever he could to get those kids out of the car. Maybe he thought it was two girls and was bumping them hoping they would get out and then continued to follow them." Defendant argues the prosecutor was making the egregious suggestion defendant was a sexually motivated monster. Again defendant did not object to the argument. But, notwithstanding, there is no showing on the record of a reasonable likelihood the jury understood or applied the objectionable comments as defendant argues. (*People v. Frye*, *supra,* 18 Cal.4th at p. 970.)

The third instance is the prosecutor's warning to the jury not "to consider punishment of the defendant." Defendant did not object. Nor is this a case like *People v. Williams* (1982) 128 Cal.App.3d 981, 990, in which the prosecutor wrongly referred to the penalty defendants might receive. There was no mention of defendant's possible punishment, only that the jury could not consider it.

Finally, defendant did object to the prosecutor remarking, "that's the job of the defense to create static." The objection was sustained and the statement withdrawn. The prosecutor then offered a more elaborate explanation about how the defense's case would be fuzzy and unclear but recommending the jury "keep sight of what the facts are." Comments that focus on the sufficiency of the evidence are appropriate. (*People v. Frye, supra,* 18 Cal.4th at p. 978; *People v. Cummings* (1993) 4 Cal.4th 1233, 1302; *People v. Bell* (1989) 49 Cal.3d 502, 538.)

Ultimately, none of the purported misconduct by the prosecutor demonstrates there was a reasonable likelihood defendant would have achieved a more favorable outcome. Therefore, any error was harmless.

III

DISPOSITION

We order the abstract of judgment be corrected to reflect a stay of the sentence on count 3. Otherwise, we affirm the judgment.

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s/Richli
J.

We concur:

s/Ramirez
P. J.

s/McKinster
J.